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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ABRAHAM L. SUGARMAN, PLAINTIFF in error,
v.
THE UNITED STATES OF AMERICA. } No. 345.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On April 6, 1917, the Congress of the United States declared a state of war to exist between the United States and the German Empire, and authorized the President to use the whole naval and military forces of the United States and the resources of the Government in the conduct of the war. About six weeks thereafter, namely on May 18, 1917, the Selective Service Act was enacted (40 Stat. 76), providing for the raising of large armies by both volunteer service and draft, and subjecting all male citizens and declarant aliens (other than alien enemies), between the ages of 21 and 31, both inclusive, to the

draft. On June 5, 1917, the registration of all persons subject to the draft had taken place as fixed by the President. On June 15, 1917, the Espionage Act (c. 30, 40 Stat. 217) was passed. On June 30, 1917, the first Selective Service Regulations were promulgated by the President, determining the procedure for calling and examining the registrants and exempting or inducting them into the service. On July 20, 1917, the drawing took place at Washington which fixed the order in which the registrants, according to their registration numbers, would be called for examination. On July 24, 1917, the date of the event out of which this case grew, the administration of the Selective Service Law was in full progress and men of draft age were awaiting their calls for examination before the draft boards.

In the midst of this situation, on the evening of July 24, 1917, a meeting was held at Kelso Township, Sibley County, Minn., about 7 miles from Arlington, Minn. (R. 9, 58.) The meeting had been rather surreptitiously called, as no public announcement had been made nor printed notices distributed. The only notices of the meeting had been given apparently by word of mouth or over the telephone (R. 9, 33, 42, 58). The announcement, however, must have been quite extensively given, for the audience which gathered was estimated at from five to eight hundred persons, coming from all directions and from points as high as 25 miles distant (R. 17, 19, 29, 54). The automobiles in which the members of the audience had come numbered over 200 (R. 29, 37, 43).

It does not appear that the plaintiff in error, Abraham L. Sugarman (hereinafter referred to as the defendant), had any part in the calling of the meeting. He received an invitation to speak thereat and was the chief speaker, having been assigned to this meeting by, presumably, the St. Paul, Minn., Local of the Socialist Party (R. 10, 13, 37, 58). It was stated that previous to his arrival a petition praying for the repeal of the Selective Service Act had been circulated among the audience (R. 15, 46). The defendant brought with him a petition addressed to Congress asking that the Selective Service Act be submitted to a vote of the people, but it does not appear that any attempt was made to get signers thereto (R. 52). In fact, Sugarman arrived at the meeting quite late, began to speak immediately upon his arrival, finished his speech toward midnight, and then most of the audience quickly left the premises (R. 16, 25, 27.) If he came to obtain signatures to such a petition, he abandoned that mission or did not have the opportunity to carry it out.

The meeting was held out of doors, in the rear of a country town hall (R. 9, 33). The audience contained very few women, and young men predominated (R. 19). The number of men in the audience of draft ages was variously estimated by the witnesses at from 40 or 50 to as many as 50 per cent of the whole audience. The Government's witnesses identified 15 of these registrants by name, some of whom themselves testified to the events of the meeting (R. 18, 30, 37, 54).

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In the course of his address, as described by the Government's witnesses, the defendant, Sugarman, attacked the war as a capitalists' war, mentioning specifically certain capitalists, as for instance J. P. Morgan and Rockefeller, whom he called the "pals" of President Wilson. After attacking the war as a purely commercial war, he then proceeded to state "This is a war of the rich man." Then followed statistics of the small percentage of Americans owning their own homes, and turning to a portion of the audience, he said: "Can you imagine anybody going on and fighting for his landlord?" He declared the Selective Service Act to be unconstitutional and to impose no obligation on the part of the people to abide by it. "This is supposed to be a free country. Like hell it is"! is a quotation from that part of the address which dealt with the draft law. Proceeding on this same theme, he said, "This is not the first time that conscription was ever tried in this country; they tried conscription during the Civil War. How did it work out? There was a small town near Augusta, Me., which said 'We will not be conscripted.' What did they do? They seceded from the Union. Not one man from that community was drafted during the Civil War, and the reason they were not drafted was because they stuck together. That is an example of what you people can do by sticking together." Further in the course of this speech, he stated: "In St. Paul there were thousands of Socialists who did not register and the Government didn't bother them, except now and then one of them

is picked up, merely as a sop to the public or to appease the public, but the rank and file of them were not bothered at all and it is just a question of sticking together." Later, possibly as an answer to a question from the audience, although this is not quite clear, he said: "The conscription officer would have a hell of a time if he came around here to-night, wouldn't he?" Some one in the audience asked: "Do the Socialists generally refuse to register?" To which he answered: "There were thousands of them in St. Paul who did not register." Another in the audience asked why, if there were so many Socialists who refused to register, the Government did not arrest them? To which the defendant finally answered: " They don't arrest them because there are so many of them; they simply don't bother them; they just let them go." He was asked why he himself had registered, and answered that he had registered because the leaders of his party had concluded that he would be more valuable out of jail than in jail and, to please them and for the good of the party, he had registered against his own wish. (R. 38, 39, 40.)

This description of the salient features of the speech was substantially corroborated by all of the Government's witnesses (R. 12, 18, 30, 44). Other passages along the same line could be quoted. The defendant himself took the stand, did not attempt to testify as to what he had said at the meeting nor to deny the description of nor the quotations from his address as testified to by the Government's witnesses, but rested

content with a general denial that he had attempted or intended to urge, counsel, or advise any men to disobey the law or refuse military duty (R. 52).

The Government's testimony further shows that, either during the meeting or while the crowd was standing around the defendant immediately after the meeting, one of the audience asked him: "What would you advise anyone to do who had registered if a conscription officer came around to get you?" To which the defendant answered: "All that will happen, your number will be called, and if you refuse to respond to your number, you know what will happen to you; but, at any rate, you won't be shot in France." The questioner persisted in asking what the defendant advised them to do. The defendant answered: "Well, if you people all stick together, like those 5,000 Socialists down in St. Paul, the chances are that the Government will not molest you, and you will go right along running your farm and raising your pigs just as you are doing to-day." (R. 39; see also 25, 30, 31.) This conversation between a member of the audience and defendant was denied by defendant and his witnesses (R. 52, 54, 55).

The defendant was indicted for wilfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States in violation of Section 3, Title I of the Espionage Act (act of June 15, 1917, c. 30, 40 Stat. 217), by urging, counseling, and advising a number of young men, registrants under the Selective Service Law, fifteen of whom are named in the indictment, not to report

when ordered to do so by the military authorities. The text of this section is appended in the margin hereof.[1] A demurrer to the indictment was interposed and was overruled by the court. Thereupon the defendant made a motion to quash the indictment, which was overruled. The defendant plead not guilty. At the end of the Government's testimony in chief the defendant moved for a directed verdict. This was overruled by the court. The jury found the defendant guilty. A motion for arrest of judgment and a new trial was overruled.

While the record shows a long list of assignments of error, the plaintiff in error has in his brief reduced these to two points against the sufficiency of the indictment, objection to two portions of the charge to the jury and an attack on the constitutionality of Section 3 of Title I of the Espionage Act. One of the points raised against the indictment and one of the objections to the charge raised an identical question of law; so that the contentions of the plaintiff in error are ultimately reduced to the following:

1. That the indictment fails to state facts with sufficient particularity or completeness to constitute an offense;

[1] SEC. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

2. That the indictment and the charge are based upon the erroneous theory that men who are registered under the Selective Service Act are a part of the military forces of the United States;

3. That the court erred in charging the jury that proof of "some of the words" attributed to the defendant was sufficient, with proof of intention, etc.;

4. That the defendant's statements upon which the prosecution is based are within the protection of freedom of speech guaranteed by the First Amendment of the Constitution.

As shown hereinafter, the Government claims that the plaintiff in error's brief demonstrates that there is not sufficient basis for the jurisdiction of this court in this case; but, for completeness and order, the said four points are discussed in the same order, contending:

1. That the indictment is sufficient:

2. That persons registered under the Selective Service Act and subject under that Act to call for military service fall within the expression "members of the military forces" in Section 3, Title I, of the Espionage Act;

3. That the alleged objectionable words in the charge have, as appears from the context, been misconstrued and distorted by the plaintiff in error; and

4. That the constitutionality of Section 3, Title I of the Espionage Act is settled and obvious; that the plaintiff in error's contention is unsubstantial, unreal, and frivolous, and, therefore, the case should be dismissed for lack of jurisdiction.

I.

The indictment is sufficient.

The defendant contends that the indictment fails to state facts necessary to constitute an offense, in that it did not set forth in full the exact words which the defendant is charged with having uttered. The indictment in this case, however, does much more than describe the offense in the language of the statute. It charges the defendant, in the words of the statute, with "felonious and willful attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States," and then proceeds to name 15 members of the forces upon whom this attempt was exercised, to specify the date of this attempt, thus identifying the accusation against the defendant with more than sufficient particularity, and then describes the character and substance of the method used by the defendant to accomplish his purpose, namely by urging, counseling, and advising these named men and many others not to report for military service when ordered to do so by the military authorities of the United States.

This indictment is obviously sufficiently detailed and particularized to inform the defendant of the exact nature and time of the offense with which he is charged and satisfies all the requirements of criminal pleading.

The defendant cites cases relating to that type of crime in which the words themselves, as distinguished from their substance and effect or the purpose with which they are used, constitutes the gist of the offense, as for instance, the use of obscene language or libel. Such cases do not apply to the case at bar, where the attempt to cause insubordination, etc., is the gist of the offense, the particular words used in any case constituting the evidentiary details of the method by which the unlawful purpose was carried out. In a case of this character the indictment is sufficient when, as in the record at bar, it includes a statement of the general nature, purport, and effect of the words used. All further details would be pleading evidence.

In *Commonwealth* v. *Moulton*, 108 Mass. 307 (1871), the defendant was indicted for verbally threatening to accuse another of a crime with intent thereby to extort money. The indictment, though omitting to specify the words of the threat, was held sufficient, because it set forth the substance of the threat. The court said, on page 308:

> The gist of the offence is the intent to extort money by a malicious threat to accuse of some crime. The words used do not constitute the offence, without the accompanying intent to extort. And the case does not fall within those where the words themselves are alone the gist of the offence, as in indictments for scandalous or contemptuous words spoken to a magistrate, for seditious or blasphemous words, or for libel. In such cases, the words must indeed be set forth with par-

ticularity. *Commonwealth* v. *Kneeland*, 20 Pick. 206. *Commonwealth* v. *Wright*, 1 Cush. 46. *Commonwealth* v. *Tarbox*, Ib. 66. *Regina* v. *Tiddeman*, 4 Cox Crim. Cas. 367.

See also—

Commonwealth v. *Goodwin*, 122 Mass. 19 (1877).

Clark's Criminal Procedure (2d Ed. 1917), 249.

When the tendency of the words used, rather than the particular words themselves, constitute the gist of the offense, it is sufficient for the indictment to charge this general tendency, without detailing the particular words.

1 Wharton's Criminal Procedure, 10th Ed. 296.

An indictment charging the defendant with "verbally threatening to kill and murder" was held sufficient in *State* v. *O'Malley*, 48 Iowa, 501 (1878), notwithstanding the fact that it did not set out the words used.

Bishop says in his *New Criminal Procedure*, page 286:

> The rule for the indictment is that, subject perhaps to exception, it may set out the facts according to their legal import or their outward form, at the pleader's election. Thus a written instrument introduced into a pleading may, except where special reason forbids, be described either by its legal effect or by its words (citing *United States* v. *Heinze*, 161 Fed. 425).

See also *Bishop's New Criminal Procedure*, page 452.

These rules relating to writings apply equally to spoken words. *Clark's Criminal Procedure*, page 249.

Where a writing is relied on as proof or evidence of the facts charged, and not as in itself constituting the offense, it may be described in a general manner and need not be set out.

People v. *Warner*, 5 Wend. 271 (1830).

In *Brown* v. *Commonwealth*, 2 Vir. Cases, 516 (1826), the court held sufficient an indictment for sending in the form of a letter a challenge to fight a duel, which set out neither the words used nor the substance thereof.

The indictment specified the date of the defendant's offense. He was thereby informed that it arose out of his Kelso speech. The indictment gave him the names of fifteen members of his audience of draft age. It told him the general nature of the charge and the general nature and effect of his utterances on that occasion. It left no room for surprise. The indictment fully advised the defendant of the nature of the issues in the case. He did not move for a bill of particulars setting forth the exact words attributed to him. Had he made such a motion and had it been overruled, that would not, under the above authorities, have been error and could not possibly have been prejudicial. The defendant himself took the stand and did not attempt to testify to the words used by him, but contented himself with denying the general nature

of his remarks to be as alleged in the indictment. This is plainly a case in which an appellate court will not consider an objection which is, at best, a matter of form only and involves no prejudice to the interests of the defendant.

U. S. R. S. sec. 1025 provides:

> No indictment found and presented by a grand jury in any District or other Court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84 (1907), this court said:

> Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.
>
> In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.
>
> Had it been made by demurrer or motion and overruled, it would not avail the defendant, in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in

which the offense charged was committed. See U. S. Rev. Stat. 1025; *Connors* v. *United States*, 158 U. S. 408, 411.

There can be no doubt that the accused was fully advised of and understood the precise facts which were alleged to be a violation of the statute.

See also—

Lamar v. *United States*, 241 U. S. 103, 116 (1916).

Roberts v. *United States*, 248 Fed. 873.

Dunlop v. *United States*, 165 U. S. 486, 491.

Rosen v. *United States*, 161 U. S. 29, 34, 36.

Bartell v. *United States*, 227 U. S. 427.

The case of *U. S.* v. *Schutte*, 252 Fed. 212, cited and extensively quoted on page 12 of defendant's brief does not support his contentions. It arose upon a demurrer to the indictment which set forth only the utterances made by the defendant, with nothing whatever to show that they had been made to an audience containing persons subject to military service or any other circumstances surrounding the utterances themselves from which an inference of the unlawful intent or purpose could possibly be drawn. The court correctly held that the utterances in and of themselves did not demonstrate the criminal intent or purpose. In the case at bar the indictment charged and the proof demonstrated that the audience included men subject to military service.

II.

Persons registered under Selective Service Act and awaiting call from draft boards fall within "Military forces of the United States."

Apart from the jurisdictional question referred to in the "Statement of the Case" and to be discussed later in the brief, the main issue in this case is the question whether persons who have registered for the draft and have received their serial numbers and are awaiting call for examination before the draft boards constitute members of the "military forces of the United States" within the meaning of that clause of section 3, Title I, of the Espionage Act upon which this case is based.

The history of the statutes in the United States relating to military service, beginning with the statute of 1792 and going down through the Selective Service Act itself, shows that in the evolution of the Federal military policy, male citizens and declarant aliens of the ages designated in the statutes (eighteen to forty-five) came to be treated as constituting the national or military forces of the United States, subject to call into active duty whenever the emergecy might require, and in the Espionage Act, the expression "military forces of the United States" was intended to have the significance which had become attached to this phrase in the course of this statutory evolution. Furthermore, while the principle of strict construction of penal statutes applies here as elsewhere, in questions of statutory interpretation it is the intention of Congress, which is always the object of the

inquiry; and, in considering the meaning of any part of the Espionage Act, the tremendous emergency for which Congress was legislating should be kept in mind. That Act was pending contemporaneously with the Selective Service Act itself, and it was passed a few weeks after Congress had determined upon the raising of great new armies under that act. The evident design of this Section 3 of the Espionage Act was to protect from deliberate obstruction and interference the whole process of raising these great armies. In view of this situation, it may fairly be determined, that in the use of the expression "military forces of the United States," which had therefore received a special significance in the military statutes of the country, Congress intended to cover the whole body of persons constituting the national forces, including those in active service, those in any stage of the process of induction into service and those in reserve. This expression has come for construction before practically every district court in the United States, and with but three or four exceptions, they have given it the broader rather than the excessively narrow interpretation for which the defendant contends.

(a) Statutory history of phrase, "Military forces of the United States."

A detailed description of the statutory history of the Federal policy relating to the organization of military forces begins with "An Act more effectively to provide for the National Defense by establishing an uniform militia throughout the United States (Act of May 8, 1792, c. 33, 1 Stat. 271). In the first

section, this provides "that each and every free able-bodied male citizen of the respective States who is or shall be of the age of eighteen years and under the age of forty-five years shall severally and respectively be enrolled in the militia, etc." It is to be noted that this provided for the enrollment into the militia forces of the "citizens of the respective States," and not the citizens of the United States nor any declarant aliens. This statute represents the beginning of that mixed system of State and Federal militia or rather State militia under varying degrees of Federal control, which, until the Civil War, was relied upon, together with the Regular Army and occasional volunteer armies, to constitute the national forces. Amongst the decisions interpreting these early militia statutes is *Tyler* v. *Pomeroy*, 8 Allen (Mass.), 480, 493, where the court said:

> Under this power to organize (the militia) Congress has the exclusive power of determining who shall constitute the militia, and all persons coming within the class defined by Congress are members of the militia *without any act of their own.*

This is an early recognition of the principle that a man becomes a member of the forces by virtue of the statute itself and may be treated as a deserter subject to court-martial, though he fails to report for service and fails to take any steps himself toward induction into service. See also, to the same effect,

Opinion of Justices, 14 Gray, 614.
McCall's Case, Federal Cases, No. 8669.
Kneedler v. *Lane*, 45 Pa. St., 238.
Houston v. *Moore*, 5 Wheaton, 1.
Martin v. *Mott*, 12 Wheaton, 19.

This principle has received uninterrupted judicial sanction, including cases arising under the Selective Service Act itself.

From the beginning of our national history and especially during such periods of emergency as the War of 1812, the Mexican War, and the Civil War, the inadequacies of the military organization were pointed out by Army officers and others. It was not, however, until the breakdown of this State militia and volunteer system in the Civil War, that Congress was prevailed upon, in the Act of March 3, 1863, to create a great national force, consisting of all male citizens and declarant aliens of the designated ages, subject to compulsory service when called.

This period of the statutory history of the Federal military policy has been recently summarized by this court in the *Selective Draft Law Cases* 245, U. S. 366, 384 in the following language:

> And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the Government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every State (Act of May 8, 1792, c. 33, 1 Stat. 271)

which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the States according to their quota to be trained as directed by Congress and to be called by the President as need might require. (Act of May 9, 1794, c. 27, 1 Stat. 367; Act of February 28, 1795, c. 36, 1 Stat. 424; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of March 3, 1803, c. 32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of March 30, 1808, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705). When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border (Upton, Military Policy of the United States, pp. 99 et seq.), the Government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the

authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the Proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the States in accordance with the previous acts of Congress. (Proclamation of April 15, 1861, 12 Stat. 1258). That force being inadequate to meet the situation, an act was passed

authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. (Act of July 22, 1861, c. 9, 12 Stat. 268). This was soon followed by another act increasing the force of the militia to be organized by the States for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863, c. 75, 12 Stat. 731, was adopted entitled "An Act for enrolling and calling out the National Forces and for other purposes." By that Act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of twenty and forty-five was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the

militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July 1863, of February and March, 1864, of July and December 1864, producing a force of about a quarter of a million men. (Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866). It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

This Civil War statute (Act of Mar. 3, 1863, c. 75, 12 Stat. 731) provided in the first section thereof:

> That all able-bodied male citizens of the United States and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years,—are hereby declared to constitute the *national forces* and shall be *liable*

to perform military duty in the *service* of the United States when called out by the President for that purpose.

Section 3 provided:

> The *national forces of the United States* not now in the military service, enrolled under that Act, shall be divided into two classes, the first of which shall comprise all persons subject to do military duty between the ages of 20 and 35 years, and all unmarried persons subject to military duty above the age of 35 and under the age of 45; the second class shall comprise all other persons subject to do military duty, and they shall not, in any district, be called into the *service* of the United States until those of the first class shall have been called.

Section 13 provides:

> And any person failing to report after due service of notice (to report for duty) * * * shall be deemed a deserter * * * and sent to the nearest military post for trial by court martial.

This statute is significant. It marked a radical change in the Federal military policy. The first matter of note in its language is that it converts into the military forces not, as in the case of the old militia statutes, the "citizens of the States," but the "citizens of the United States" of the designated classes and ages. It also includes declarant aliens. It further makes a clear distinction between "forces" and "service." All citizens and declarant aliens of

the designated classes and ages are declared to constitute the "national forces," which are then divided into two subdivisions, those in the service and those not yet inducted. This creation of a "national force," consisting of male citizens of the United States and declarant aliens of certain ages, from which drafts into the Federal service may be made from time to time as the emergency may require and the President or Congress may direct, has been continued and recognized ever since this statute of 1863 down to the present, including the Selective Service Act and its supplements.

The next general military statute was passed for the Spanish-American War, being the act of April 22, 1898 (30 Stat. at Large 361), the first section providing:

> All able-bodied male citizens of the United States and persons of foreign birth who shall have declared their intention to become citizens of the United States * * * between the ages of 18 and 45, are *hereby declared to constitute the national forces* and, with such exceptions and under such conditions as may be prescribed by ' w, shall be *liable* to perform military *duty* in the *service* of the United States.

The only change made by this statute was the extension of the age limits to include all over eighteen. It maintains the creation of "national forces" and the distinction between "forces" and "service." This statute has never been repealed. It is still the law and makes every citizen of the United States

and declarant alien of the designated ages and classes a member of the "military forces of the United States."

On June 3, 1916, in the face of an impending emergency which might require a largely increased and reorganized Army, Congress passed the National Defense Act (39 Stat. c. 134, 197). After describing the organization of the Regular Army and Reserve Officers, this statute provides, in section 57, as follows:

> Composition of the militia. The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States who shall be more than 18 years of age and, as hereinafter provided, not more than 45 years of age, and said militia shall be divided into three classes—the National Guard, the Naval Militia, and Unorganized Militia.

The statute then proceeds to deal with the organization of the National Guard and National Guard Reserve, obviously constituting the successors of the old State militia, under a mixed State and Federal control. It is to be noted, however, that it provides for the draft of the individual members of the National Guard into the Federal forces, and section 57 itself speaks of the "Militia of the United States." The statute contains no further reference to the Unorganized Militia, which remains, therefore, obviously in the light of the statute of 1863 and the unrepealed

statute of 1898, simply that portion of the "national forces" which has not been inducted into the organized Regular Army or National Guard.

The Selective Service Act makes no change in this situation. It provides for bringing the Regular Army and National Guard up to their maximum strength, for certain volunteer bodies, and for the drafting into new national armies of that portion of the remainder of the "national forces" falling between the ages of twenty-one and thirty-one. Later in the war, provision was made for the drafting of the rest of the "national forces" falling between the ages of eighteen and forty-five.

It is to be noted in this connection, that the process of selecting men for active service provided in the Selective Service Act is a process of exclusion and not of inclusion. All of the designated classes and ages are liable to active service unless exempted as provided in the statute. Taken in connection with the unrepealed Act of 1898 and the National Defense Act, the draft sections of the Selective Service Act simply provide the call into service of a portion of the existing "national forces."

The decisions under the Selective Service Act, as under the draft acts of 1863 and 1898, clearly uphold the jurisdiction of courts-martial to try and punish as deserters men who fail to respond for service when called into service by the draft boards. The question was fully discussed in *Franke* v. *Murray*, 248 Fed. 865, a decision of the Circuit Court of Appeals, Eighth Circuit, the court deciding squarely against

the contention of a registrant, who had failed to respond to the call for service, that as he had not entered the military service, he must be treated as a civilian and not subject to the military tribunal.

The history and development of the Federal statutes upon compulsory military service clearly demonstrate, therefore, that the "national forces" include the whole body of able-bodied males, both citizens and declarant aliens, of the ages of eighteen to forty-five years. The Selective Service Act designated the portion of these forces between the ages of twenty-one and thirty-one as immediately subject to the call into service. Section 3, Title I of the Espionage Act, passed at about the same time, was designed to protect the process calling them into the service. The distinction which the defendant seeks to make between "military forces" and "national forces" is obviously untenable. Our national forces, in the sense of all those who contribute to the national strength, financial and industrial as well as military, could not be limited to persons under forty-five; so where national forces are referred to as the males of certain limited ages, especially in statutes dealing exclusively with the subject of armies, "national forces" and "military forces of the United States" are obviously synonomous expressions.

(b) Interpretation contended for by defendant would render a portion of the section superfluous and without effect.

This interpretation also finds support in the provisions of the clause of the Espionage Act itself involved in this case. This clause provides for the

punishment of persons who "cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States." Insubordination, disloyalty, mutiny, or refusal of duty on the part of a soldier in the service is and, of course, always has been a violation of the Articles of War. Article 22 prohibits mutiny or sedition. Article 47 prohibits desertion and provides for the punishment thereof. Article 62 covers all crimes not capital and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in other articles. Consequently section 332 of the Penal Code provided for the punishment of any person guilty of causing one in the military service to commit any such offense. Therefore no statute was needed at the time of the passage of the Espionage Act to reach those who caused insubordination, etc., on the part of men in military service. On the principle, therefore, that no portion of a statute should be given an interpretation which would render it an absolutely superfluous and unnecessary piece of legislation, some significance and effect should, if possible, be sought in the language used by Congress. The clause is a blanket clause, intended to cover all attempts, successful or unsuccessful, to cause unlawful disobedience to the constituted authorities on the part of men either already in the military service or subject to call into that service.

(c) Decisions of the courts.

As above stated, the question has been passed upon by almost all District Courts and with an overwhelming preponderance in favor of the decision of the trial court in this case. Two of these decisions are reported, namely *U. S.* v. *Hall*, 248 Fed. 150, which supports the defendant and *U. S.* v. *Boutin*, 251 Fed. 313, which supports the Government. Most of these decisions being contained in the charges to the jury have not found their way into the Federal Reporter. The Department of Justice has printed in a series entitled "Interpretation of War Statutes" a number of bulletins containing decisions of the courts on the war statutes, and the following references are to such bulletins.

The following are some of the decisions in United States District Courts which clearly hold the expression "military and naval forces of the United States" to include all persons registered under the Selective Service Act:

United States v. *Huhn*, District of Wyoming, Bulletin 58.

United States v. *Wolf*, Eastern District of New York, Bulletin 81.

United States v. *Mackley*, District of Vermont, Bulletin 83.

United States v. *Frerichs*, District of Nebraska, Bulletin 85.

United States v. *Rhuberg*, District of Oregon, Bulletin 94.

United States v. *Sandvick*, District of Alaska, Bulletin 113.

United States v. *Rutherford* et al., Eastern Dist. N. Y., Bulletin 119.

United States v. *Goldsmith*, Southern Dist. of Alabama, Bulletin 133.

United States v. *Debs*, Northern Dist. of Ohio, Bulletin 155.

United States v. *Coldwell*, District of Rhode Island, Bulletin 158.

United States v. *Reeder et al.*, Western Dist. Oklahoma, Bulletin 161.

The following are cases which give a still broader interpretation and, following the statutes above referred to, hold that the expression includes all male citizens and declarant aliens of the ages of eighteen to forty-five years:

United States v. *Vincente Balbas Capo*, Dist. Porto Rico, Bulletin 37.

United States v. *Zittel*, Western Dist. of Wash., Bulletin 90.

United States v. *Stokes*, Western Dist. of Missouri, Bulletin 106.

United States v. *Hitchcock*, Northern Dist. of Ohio, Bulletin 122.

United States v. *Weinsberg*, Eastern Dist. of Missouri, Bulletin 123.

United States v. *Youngman*, Southern Dist. of Alabama, Bulletin 137.

United States v. *Denson*, Northern Dist. of Alabama, Bulletin 142.

United States v. *Wishek*, District of North Dakota, Bulletin 153.

United States v. *Hicks*, Western Dist. of Oklahoma, Bulletin 160.

A typical expression of the larger reasons for the interpretation contended for by the Government is the following quotation from the charge to the jury in *United States* v. *Huhn* in the District Court of Wyoming, Bulletin No. 58:

> Considering the broad purposes of the selective-draft act, and considering the evils that were intended to be met by the statute under which this indictment was drawn, you are instructed that the words "military forces" as therein used, is to be given a broad rather than a narrow meaning, and held to mean not merely the men in active military service, but also the men who had registered as required by law.

The following quotation from the charge to the jury in *U. S.* v. *Stokes*, Bulletin 106, illustrates the reasons in support of the prevailing and, as we contend, the correct view:

> Discussing then the nature of the publication and its adaptability to the accomplishment of the purpose charged, it is proper first to define to you what is meant by the military or naval forces of the United States. In the first place, they include all in active service, either in training at military or naval camps or within the body of the Army and Navy in actual service after the period of training has been completed. In the next place, by act of Congress, still in force, all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United

States, under and in pursuance of the laws thereof, between the ages of 18 and 45 years, are declared to constitute the national forces, and, with such exceptions and under such conditions as may be provided by law, shall be liable to perform military duty in the service of the United States. Third, by the selective service act of May 18, 1917, the President was authorized to increase temporarily and for the purposes of this war the Military Establishment of the United States. All male persons between the ages of 21 and 30 inclusive, were required to register on the 5th day of June, 1917. They did so to the number approximately of ten millions. All were given a serial number, and subsequently thereto and from time to time have been, are being, and will be drawn and placed in active service according to their classes and physical ability and as necessity may arise. All such male persons so registered and having received their serial number subjecting them to call are a part of the military and naval forces of the United States. It will thus be seen that such military and naval forces consist of those already at the front, in training camps preparatory thereto, and among the body of the people subject to call and enlistment for military and naval service.

A similar charge to the jury though perhaps not applicable to the facts of the case was upheld by the Circuit Court of Appeals, Third Circuit, in *United States* v. *Krafft*, 249 Fed. 919.

III.

The court did not err in the use of the phrase "some of the words," as this plainly referred to some of those words or expressions of the defendant in which he urged disobedience of the Selective Service Act.

The defendant contends that the court erred in the following passage in the charge to the jury:

> It is for you to determine from the evidence whether the words claimed by the Government to have been uttered by the defendant at this time and place, or some of them, or substantially these words, were in fact uttered by the defendant at the time and place in question. If you fail to find that the words charged by the Government, or some of them, or substantially those words, were uttered by the defendant, at the time and place in question, then the defendant cannot be convicted in this case, and your verdict should be for acquittal. But if after a full and fair consideration of the evidence you are satisfied beyond a reasonable doubt that the defendant did utter the words claimed by the Government, or substantially those words, or some of them, then you will consider whether the defendant intended, by the use of the words, to produce insubordination, disloyalty, or refusal of duty in the military forces of the United States, that is, in the men present who had registered under the Conscription Act.

The point attempted to be raised by the defendant is that, as, amongst the numerous quotations from defendant's utterances which were placed before the

jury, there were a few words which were in and of themselves harmless, the above passage would have permitted the jury to base a verdict of guilty upon these few harmless words, even though they did not believe the defendant guilty of uttering any of the objectionable sentiments. But the charge, taken as a whole, shows plainly that "some of them" was intended to mean some of the numerous objectionable utterances attributed to the defendant and could not have been given any other meaning by the jury. The whole case related to portions of a lengthy address, and the charge unmistakably related exclusively to those portions of the address which were of a nature to cause insubordination, disloyalty, and refusal of duty. The court gave to the jury in complete detail the various utterances with which the Government's witnesses had charged the defendant (R. 61, 62), occurring in different portions of his address or in colloquies with different members of the audience, and then proceeded in the language objected to by the defendant, plainly meaning, not that the jury might base a verdict of guilty upon a harmless word here and there occurring in the midst of these seditious utterances, but might base such verdict upon some of these seditious utterances without necessarily believing the defendant guilty of all of them.

IV.

Statute clearly constitutional—Defendant's contention unsubstantial and without merit and insufficient on which to base jurisdiction of this court in this case.

The defendant's attack upon the constitutionality of Section 3, Title I, of the Espionage Act is without merit. That section specifies three types of offenses, only one of which is involved in this case. Leaving out those portions which deal with the other types, the section reads:

> Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, shall be punished, etc.

Surely the mere text of the statute disposes of the question of constitutionality. The power to make war and to raise and support armies, certainly includes the power to punish those who deliberately attempt to stir up disloyalty and insubordination amongst the forces with which the war must be carried on. The language used by defendant and addressed to members of the military forces was plainly of a nature to stir up disloyalty and insubordination amongst them, in fact, counseled disobedience to the requirements of the draft law, and the jury has found that it was the defendant's intention to attempt to bring about that result. This clause of the statute, whose constitutionality is obviously beyond question, applies unmistakably to the facts

of this case, as testified to by the Government's witnesses and found by the jury.

Were it necessary to cite a precedent for upholding the validity of statutes which provide for the punishment of those who counsel disobedience to the Selective Service Act, such precedent would be found in the recent decisions of this court in the cases of *Goldman* v. *United States*, *Kramer* v. *United States*, and *Ruthenberg* v. *United States*, 245 U. S. 474, 478, 480. In those cases this court affirmed convictions based on speeches and similar activities quite analogous to the defendant's utterances in the case at bar. In the *Kramer* case, for instance, the circulars distributed by the defendants therein pictured the war as a capitalists' conspiracy. In the *Goldman* case, Emma Goldman, in her speech, used an argument quite analogous to one advanced by Sugarman, namely, that if enough men refuse to serve, the Government would find itself helpless to enforce the draft law. In the *Ruthenberg* case, which, like the case at bar, was concerned with a speech by a socialist leader at a public meeting purporting to relate to the attitude of the Socialist Party toward the war, one of the defendants advanced the same thought as expressed by Sugarman herein, namely, that imprisonment in America is preferable to being shot in France. In short, with a difference in the choice of words used, quite natural to different speakers, the sentiments expressed by the defendants in the earlier cases corresponded to the defendant's utterances in the case at bar. The fact that they were prosecuted

under sections 37 and 332 of the Penal Code, whereas the defendant has been charged under the Espionage Act, is, of course, irrelevant to the question of the constitutionality of punishing those who address such sentiments to men of draft ages.

In the *Goldman*, *Baker* and *Ruthenberg* cases, no constitutional point was raised or discussed except that of the constitutionality of the Selective Service Act itself; for, obviously, if that statute is valid, the constitutionality of prohibiting attempts to cause violations thereof necessarily and inevitably follows. There is, therefore, no merit in the constitutional point raised in this case, and it must have been inserted for the sake of giving a colorable claim to the appeal to this court. The frivolous nature of this constitutional point could not come clearly to the Government's attention until the defendant's brief was filed, so that this has been the first opportunity to raise with complete assurance the question of the jurisdiction of this court. Attention is, therefore, directed to the fact that the printed record and defendant's brief demonstrate that this case is not genuinely and seriously one, which in the language of section 238 of the Judicial Code, "involves the construction or application of the Constitution of the United States or in which the constitutionality of any law of the United States is drawn in question," and, therefore, is not a case falling within the jurisdiction of this court.

Gwin v. *United States*, 184 U. S. 669 (1902).

Objection to the jurisdiction of the court may be raised at any stage of a case. See *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382, which was quoted with approval in *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419 (1910).

Lampasas v. *Bell*, 180 U. S. 276, 282 (1900).

In *Farrell* v. *O'Brien*, 199 U. S. 89 (1905), this court held it to be settled that the mere averment of a constitutional question is not sufficient where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason, citing *Fayerweather* v. *Ritch*, 195 U. S. 276, 299. This decision was followed with approval in *Goodrich* v. *Ferris*, 214 U. S. 71 (1909).

In *Brolan* v. *United States*, 236 U. S. 216 (1914), it was held that if the constitutional question relied upon as a basis for the court's jurisdiction was frivolous, it affords no basis for jurisdiction. This case was followed in *Weber* v. *Freed*, 239 U. S., 325 (1915).

CONCLUSION.

There are no errors apparent upon the record of this case; and, by reason of the jurisdictional defect disclosed by the record and defendant's brief, the petition in error should be dismissed.

JOHN LORD O'BRIAN,
The Special Assistant to the Attorney General for War Work.

ALFRED BETTMAN,
Special Assistant to the Attorney General.

JANUARY, 1919.

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BRIEF OF PLAINTIFF IN ERROR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1917.

No. 836 345

ABRAHAM L. SUGERMAN,
Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the District of Minnesota.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

No. 836.

ABRAHAM L. SUGERMAN,
Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the District of Minnesota.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error in this case, Abraham L. Sugarman, whom we shall refer to for brevity as the defendant, was convicted and sentenced to the penitentiary at Ft. Leavenworth, Kansas, for a term of three years for violation of Section 3 of the "Espionage Act." The indictment presented against the defendant was as follows:

> (a) "* * * That heretofore, to wit, on the (2-3) 24th day of July, A. D. 1917, the United States then and there on said date being at war, one Abraham L. Sugarman, late of said division and district, then and there being at the Township of Kelso, in the County of Sibley, in the State and District of Minnesota, and

within the jurisdiction of this court, did feloniously and wilfully attempt to cause *insubordination, disloyalty, mutiny and refusal of duty* in the military forces of the United States, to the injury of the service and of the United States, by then and there urging, counseling, and advising a number of young men, to wit: Martin Blasing, Geo. Sander, Albert Sander, G. William Wolter, Wesley Beseke, John F. McGovern, Louis Kill, Herman Vonder Brelje, Edward Weskworth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Bort. Mesker, and Raymond Mesker, and many others, whose names are to the Grand Jury unknown, not to report when ordered so to do by the military authorities of the United States for military service, they, the said Martin Blasing, Geo. Sander, Albert Sander, G. William Wolter, Wesley Beseke, John F. McGovern, Louis Kill, Herman Vonder Brelje, Edward Weckworth, Paul Weckworth, John Bertrang, Herman Bertrang, Math Haggenmiller, Robt. Mesker and Raymond Mesker, and other persons whose names are unknown, being persons who had theretofore registered for service in the military forces of the United States, in accordance with that certain act of Congress of May 18, 1917, entitled 'An act authorizing the president to increase temporarily the military establishment of the United States,' and the rules and regulations of the president promulgated pursuant to said act of Congress of May 18, 1917; he, the said Abraham L. Sugarman, then and there, well knowing that the United States was at war, on the said 24th day of July, 1917, which is against the peace and dignity," etc.

To this indictment a demurrer (4) was interposed, which was overruled and to which an exception was taken. Thereupon a plea of not guilty was entered (4), the cause submitted to the jury and a verdict

of guilty (7) was returned. Thereupon a motion for a new trial was made, overruled and (7) an exception taken. A motion for an arrest of judgment (7) was then made, which was overruled, and to this an exception was taken and the defendant was (8) sentenced to three years in the penitentiary at Fort Leavenworth, Kansas, as aforesaid.

Bill of Exceptions.

The testimony on the part of the government, which has been preserved in its entirety in the bill of exceptions, is very short. Abraham Sugarman, the defendant, is 22 years of age (78), a single man, in very poor health. He is a resident of Minneapolis, registered under the draft law and is a member of the Socialist Party of St. Paul. On July 24th 1917, there was a public meeting in Kelso, Sibley county, Minnesota (11). The defendant arrived at this meeting about 10:30 or 11 o'clock in the evening and addressed it. The defendant had with him printed forms addressed to Congress, asking for a *referendum on* the conscription act and asked those present to sign (80). There were about 500 in the audience and among them young men of conscription age, including Martin Blesing, George Sander, and others mentioned in the indictment, who had registered under the selective draft law but who had not been called upon to submit themselves for a physical examination, and neither had they been mustered into the service of the United States.

In his address the defendant is charged with stating that he was against all wars and did not be-

lieve in war, and "that previous to this there were draft laws," and that "during the Civil war there was a community in Maine that resisted the draft and the authorities left them alone and they had lived peaceably in that community"; and "that George Washington was a large land owner," and that that was the cause of the "war at that time"; and that it was the same now as then, that the common people had to give their lives for the richer men; and that in St. Paul there were some who did not register—"a certain amount of people to be arrested and there would not be room enough for them."

The defendant said this is not a free country (56); that the Conscription Act would be declared unconstitutional. There is a sharp conflict in the testimony as to defendant's answers to questions from the crowd as to refusal to respond to a call for service, and the consequences of such refusal. According to the version of the Government witnesses the answers were that if (58) "you people all stick together * * * you will go right along running your farm and raising your pigs just as you are doing today."

Defendant's speech as an entirety was characterized by John F. McGovern, the chief witness for the Government, an attorney with the Department of Justice (52), in this language (59):

> "I think that all through the speech that the question of Socialism was the predominant factor in fact, but it was in its relation to the war, and to the fact that—he emphasized that this was a war of classes, and characterized the president as (on more than one occasion)—as

a pal and chum of Rockefeller and Morgan, and rich men generally, and said it was a rich man's war; and said, 'If Socialists had been in control of Congress there would be no war at this time.' It was Socialism in relation to the war that he spoke about particularly."

Specification of Errors.

We shall urge four errors committed by the trial court to the prejudice of the defendant, which are as follows:

1. In overruling the demurrer to the indictment for the reason that the indictment does not state an offense.

(a) The indictment states conclusions of the pleader and fails to state facts showing the commission of an offense.

(b) The indictment alleges that Martin Blesing and others who were present at the time the defendant delivered his address were registered under selective draft law, but were *not* called for physical examination or mustered into the service, and we contend they were not a part of the military or naval *forces* of the United States.

2. The trial court erroneously charged the jury that (96) "Whether the parties in whom it is alleged attempt was made to procure disloyalty and refusal of duty in the military forces of the United States, it appears by the uncontradicted evidence, and is admitted that the parties named in the indictment, these young men who are alleged to have been present at the time and place in question and

registered in accordance with the act of Congress of May 18, 1917. Also that they had been given their numbers at the drawing which took place in Washington on or about July 20, 1917. The court instructs you as a matter of law that under the evidence and the law these men that are mentioned in the indictment as having been present at this meeting were in the *military forces* of the United States within the meaning of that term as used in Section 3 of the act of June 15, 1917."

3. The trial court erred in charging the jury as follows: "It is for you to determine from the evidence whether the words claimed by the government had been used * * * *or some of them* or substantially these words * * * if you failed to find that the words charged by the government or *some of them* or substantially those words, were uttered by the defendant at the time and place in question * * * but if after a full and fair consideration of the evidence you are satisfied beyond a reasonable doubt that the defendant uttered the words *claimed* by the government, or substantially those words or *some of them.*"

4. The trial court erred in that it refused to hold that what the defendant is accused of saying was not a crime and cannot be made a crime under the Constitution of the United States, same being within the protection guaranteed by the First Amendment of the Constitution.

POINTS.

We shall argue in their order the following points:

I.

The indictment in this case is bad for the following reasons:

(a) It fails to state facts necessary to constitute an offense.

(b) The indictment is presented upon the erroneous theory that men who are registered under the selective draft act are a part of and within the military forces of the United States. The trial court erroneously charged the jury that persons registered were within and a part of the military forces of the United States. The presentation of our authorities will apply to the indictment and to the charge of the court.

II.

The court erred in charging the jury that proof of *some* of *the words* charged by the government to have been used by the defendants was sufficient with proof of intention, etc.

III.

That the oral statements charged to have been made by the defendant are within the protection of freedom of speech guaranteed by the First Amendment to the Constitution.

ARGUMENT.

I.

(a) The indictment fails to state facts necessary to constitute an offense.

The indictment charges that the defendant did feloniously and wilfully attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the *military and naval forces* of the United States to the injury of the *service* and of the United States, by then and there urging, counseling and advising a certain number of young men, namely, Martin Bleasing, Albert Sanders, George Sanders and others, not to report when ordered to do so by the military authorities of the United States for military service, they, Martin Bleasing, George Sanders and Albert Sanders, being persons who were theretofore registered for service in the military and naval forces of the United States.

This indictment does not purport to state any language used of any kind or character. At most there is merely the averment of a date of "counseling and advising, etc.," but this must be taken in the formal sense of compliance with the statute, since another date, also within the period coming under the statute, could be proved at the trial. The material elements are what was said or done, and in this vital respect the statement of the offense charged is dependent entirely upon conclusions of the pleader. The charge that the defendant urged,

counseled and advised certain specific individuals and others is not disclosed by any allegation of words, oral or written, or any act. To this the district attorney replies that "it is not necessary to set out evidence." Where an offense, however, is based upon language, oral or written, good pleading will not excuse setting it forth in language, at least in substance. Where words are the gist of the offense they must be set forth.

Updegraff, 11 S. & R. 394.
Commonwealth v. *Kneeland*, 20 Pick. 206.
Archibald's Crim. Plea, Pomeroy's Notes, Vol. I, p. 281.

This is so the court may see the natural and logical effect which the language might have had on the minds of the hearers. Where language, printed or in writing, is used, of an obscene or lascivious character it may be, upon being properly identified, eliminated from the pleadings, but then only upon the specific allegation that it is too obscene to be set forth. Where words are complained of, except where excused, they should be set out. It is necessary to set out the language used.

Konda v. *U. S.* (C. A. A.), 166 Fed. 91.
Commonwealth v. *Tarbox*, 1 Cush. 66-72.
King v. *Goldstein*, Moor's, pages 8, 15, 18.
3 Broad & B., 201.
Hughes Criminal Law and Procedure, Secs. 218-83-84.
Bradlaugh v. *Queen*, 3 Q. B. 607-634.

"Urging, counseling and advising" as used in the indictment are not conclusions from facts *stated* in

the indictment, but conclusions in the mind of the pleader, from possible language or acts, undisclosed to the defendant or the court by the pleader.

We refer to only a few authorities supporting our contention:

In Hurd's Criminal Pleading (Student's Series), pages 165-166, the author says:

> "In numerous cases it is said that it is a well settled rule of the common law, that, in setting out a statutory offense, it is generally sufficient to follow the words of the statute. But there is no such rule of law. No distinction is made by the common law as respects the degree of particularity and precision essential to the description of an offense between statutory and common law offenses. All indictments must specify the criminal nature and degree of the offense, and the particular facts and circumstances which render the defendant guilty of that offense. If the statute sets out fully and precisely the necessary ingredients of the offense, then an indictment is generally sufficient which follows the words of the statute. But such an indictment is good, (not) because it satisfies the common law rules of pleading. It is undoubtedly true, as a matter of fact, that where a statute creates an offense, it is generally sufficient to follow the words of the statute. But this is true, not because there is any rule of law to that effect, but because, when the legislature creates a new offense, the statute generally specifies the facts necessary to constitute the offense."

In *United States* v. *Carll*, 105 U. S. 611, the following paragraph appears:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves

fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all of the facts necessary to bring the case within that intent."

In *Evans* v. *United States*, 153 U. S. 584, the court said:

"A rule of criminal pleading which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *U. S.* v. *Mills*, 7 Pet. 138, that an indictment for a statutory misdemeanor is sufficient if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said in this court in *U. S.* v. *Carll*, 105 U. S. 611, 'fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *U. S.* v. *Cook*, 17 Wall. 174; *U. S.* v. *Cruikshank*, 92 U. S. 542, 558.

"Even in the case of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *U. S.* v. *Simmons*, 96 U. S. 360; *U. S.* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Pettibone* v. *U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *In re Greene*, 52 Fed. 104."

In *United States* v. *Greene et al.*, 115 Fed. 343-356, Judge Speer said:

> "It is an elementary principle of criminal pleading that, where the definition of the offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the specifics; it must descend to particulars." 1 Archb. Cr. Prac. & Pl., p. 291.

Judge Charles F. Amidon in the case of *United States* v. *B. H. Schutte*, Vol. 252, Fed. Reports, page 213, wherein the demurrer to the indictment was sustained, referring to Section 3 of the Espionage Law, said:

> "On its face this statute is confined to a limited class, namely, the military and naval forces and persons subject. To violate this statute the language must directly and proximately affect one or more of the limited class mentioned in the manner specified. To stretch this law so as to cover all disloyal utterances regardless of whether they affect the military or naval forces or the enlistment and recruiting service, would not only violate the cardinal rule that criminal statutes should be strictly construed but would divide the limitations which the statute itself expresses with unmistakable clearness. Such a perversion of the law would itself be a supreme act of disloyalty, though done for the avowed purpose of suppressing disloyalty. A valid indictment under the act must express three facts:
>
> "1. The thing must have been wilfully uttered. That excludes what is spoken in the heat of passion, without deliberate purpose. The term 'wilfully' as construed by the courts necessarily imports a deliberate purpose to accomplish one or more of the things forbidden by the law. (Quoting authorities.)

"2. The language itself must have been of a character to cause some of the results denounced by the law and *should be set forth in the indictment,* or, if too offensive for a judicial record it should be described so that the court can determine whether it possess the forbidden quality. * * * It is incumbent upon the party to specify in the indictment the circumstances under which it was uttered sufficiently to show that its utterance would possibly produce the forbidden result. This can not be left to speculation or inference but must be clearly and directly charged. The circumstances are an element of crime. And it is not enough to charge that the language was uttered with intent to violate the law, it would be a mere legal conclusion when proper pleading requires a statement of facts. The question is not for the pleader but for the court, and the facts must be set forth so the court can say whether or not they are a crime." *United States* v. *Hess,* 124 U. S. 483; *Knauder* v. *United States,* 237 Fed. 8, and other authorities cited.

"Congress has not left its purpose to be ascertained solely by a judicial interpretation of the Act of June 15, 1917. It has interpreted the act itself. By the statute recently passed and approved May 16, 1918, it expressly makes the mere utterance of disloyal language on certain subjects a crime. If such utterances were already forbidden by the Act of June 15, 1917, why the amendment?"

Continuing, Judge Amidon says:

"The Supreme Court of Minnesota (167 N. W. 547) has recently had this whole subject under examination in construing a statute of that state which is much more comprehensive than the federal law under which the present indictment is framed. The case referred to is *State* v. *Spartz,* decided May 17, 1918, but

not yet reported. There the indictment charged the defendant in the following language: 'The said Jake Spartz at Dundas in the County of Rice and State of Minnesota, did speak and use the following language to the witnesses hereinafter named and to the others: "Louis Seimers was wounded and should be dead long ago." That at said time the said Louis Seimers was a soldier in the army or navy of the United States government and was wounded while so engaged as such soldier in assisting the United States government in prosecuting the present war against Germany. That it was intended to express contempt by such language for the soldiers of the government of the United States and to thereby discourage others from giving their full and unqualified support to said government in carrying on and prosecuting the present war.'

"The sections of the state law (chapter 465), Laws of 1917, under which the indictment was framed, reads as follows:

"'Sec. 2. It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth, or otherwise, that men should not enlist in the military and naval forces of the United States or the State of Minnesota.

"'Sec. 3. It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States.'

"A demurrer was interposed to the indictment and overruled by the trial court. This ruling was brought before the Supreme Court and reversed. The court sets forth the reasons for its decision in the following instructive language:

"'It will be noticed that the gravamen of the offense under each section of the law is the teaching or advocating that men should not enlist, or that citizens should not aid. That would seem to show that the legislature did not attempt by this act to punish every idle casual remark, wicked though it may be, but only those utterances which on their face show a purpose to teach or advocate what the statute forbids, or which are made under such circumstances that it would be permissible for a jury to find a like purpose. The so-called innuendoes and recitals in this indictment do not tend to show that the words uttered might be interpreted by the jury as teaching or advocating that citizens should not aid the government in the prosecution of the war; nor are there any averments of accompanying circumstances showing that the spoken words were intended to teach, or could be understood by the hearers as advocating or teaching that citizens should not render such aid or assistance in the prosecution of the war as the government requires or has indicated as proper.'

"This decision is quite in harmony with the long established principles of the Circuit Court of Appeals of this circuit, and of the Supreme Court of the United States, as will be seen from the cases above cited.

"The uniform practice in framing indictments under the Act of June 15, 1917, has been to charge that the *seditious language* was either spoken personally to men belonging to one of the classes mentioned in the act, whose names are given, or that it was spoken to a public audience composed in part of such men. The attorney-general has printed in leaflets all charges to juries, and opinions of courts in causes arising under the act since its passage. So far as these disclose, the practice has been as I have just indicated. As the indictment in the present case fails wholly to state that the

language complained of was spoken to named persons belonging to one of the classes mentioned in the act, or to an audience at which such persons were present, it is fatally defective, and the demurrer must be sustained."

The indictment before this court names the young men who were registered but it does not state any language used or act committed by the defendant from which by an inspection of the indictment it can be seen to have the unlawful purpose which the act was passed to punish.

* * * * * *

(b) The indictment and the court's charge erroneously assumed that men registered under the Conscription Act are within "the military and naval forces."

Do the military and naval *forces* in Section 3 comprise only those actually drawn or mustered into the military service? Or all registered under the Selective Draft Act? Or all male persons between the ages of 18 and 45? It is our contention that the military and naval forces include only persons actually engaged in the military service of the United States, and therefore the court erred in overruling our motion (49) and in refusing our requested charge (49) based upon this definition of the military forces.

Forces, the Century Dictionary defines as "a union of individuals; a body of persons prepared for joint action; especially a military organization, or any distinct military organization; a force of police.

Insubordination, in connection with the phrase "to the injury of the service of the United States," as defined in *Griffin* v. *Thompson,* 95 N. E. 7-9, is "intentional wilful disobedience, by a person in service." *Insubordination* is defined by Webster's International Dictionary as "disobedience to authority."

Disloyalty is defined in *Wade* v. *Barr,* 155 Mo. App. 405, as "untrue to the cause of the employer." In the clause under consideration the meaning would be "untrue to the cause of the United States," declining to obey the rules and regulations imposed upon those in the military service.

Mutiny consists of a revolt against superior officers in the army or navy.

All of these words clearly imply the relations of actual service, thus bearing out the contention that the entire application of this clause of Section 3 is to persons actually within the service. The *service* is a department, or bureau, of the government, and the *forces* comprise the persons within the department, the soldiers and officers, military or civil, as distinguished from the *service,* or the military institution, as an institution. Disloyalty, insubordination, mutiny and refusal of duty could only be the act of persons within the service who make up its forces.

The necessity for using the noun "forces" to give meaning to this clause in no way justifies a sweeping definition which makes it include the *potential military forces* of the United States. If the language chosen had been *persons in the military*

and naval forces, perhaps the construction might have been somewhat more obvious.

The trial judge (49) called attention to the Constitution, Sec. 8, Art. I, in which the grant of power to Congress is "to raise and support armies; to provide a navy; to make rules for the governing and regulation of land and naval forces." Here there is a clear differentiation between the service, the army and the navy, and the forces, the persons within the service.

The trial judge also cited, in support of his rulings, Chap. 187, Vol. 30, Statutes at Large, p. 361, an act providing for an army for the Spanish-American war, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled; that all able-bodied male citizens of the United States and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of 18 and 45 years, are hereby declared to constitute the *national forces,* and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

In this statute "national forces" refers to the body of men to be drawn from by enlistment. Here there is no ambiguity whatever, and we can not see that it argues against our contention, but on the contrary supports it.

A further citation by the trial judge was Section III of the National Defense Act, passed in June, 1916:

> "When Congress shall have authorized the use of the armed *land forces* of the United States for any purpose requiring the use of troops in excess of those of the regular army, the President may, under such regulations, including such physical examination as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war, unless sooner discharged, any and all members of the national guard and of the national guard reserve."

This section of the Draft Act supports our contention because *land forces* here refers to *enrolled men in the army.* It provides that when these troops are all in use and more are needed, the President may draft into the service additions to these forces.

Continuing, the trial judge called attention (50) to the Act of April 22, 1898 (30 Stat., p. 361), in which the *national forces* were declared to be male persons, citizens and certain others, between the ages of 18 and 45. Here again we note the distinction between "national forces" as used to designate those from whom enlistments might be drawn, and "military and naval forces" as used in the clause with which we are dealing.

We believe that a reasonable meaning justifies our conclusion that Congress intended by this latter phrase those who actually constitute the organized military and naval forces of the government, as distinguished from the use of "forces" in other statutes in specific designation of the body from which enlistments might be drawn.

II.

The trial court erred in instructing the jury as follows (62-65): "It is for you to determine from the evidence whether the words claimed by the Government to have been uttered by the defendant at this time and place, *or some of them,* or substantially these words. . . . If you fail to find that the words charged by the Government, or some of them, or substantially those words, were uttered by the defendant at the time and place in question * * * " We concede that it was not necessary for the Government to prove the exact words used by the defendant; also not necessarily all the words attributed to the defendant. Some of the words claimed to have been uttered by the defendant no doubt were uttered by him, and at the same time some of the words were harmless even from the viewpoint of the Government's charge.

But the jury was authorized by this portion of the court's charge to find the defendant guilty for using the most harmless words, as carrying with them all the words charged by the Government.

III.

The statements attributed to the defendant come within the protection of the First Amendment to the Constitution, guaranteeing the freedom of speech. The instruction of the trial judge on freedom of speech (101) limited the character of permissible public discussion of public policies to "a right to ***honestly*** discuss a measure or a law, and to ***honestly*** criticize it."

There are numerous cases pending in this court in which this issue is raised. Among them is the case of Eugene V. Debs, plaintiff in error, against the United States, which has been advanced for a hearing upon the same day set for hearing of this case. In the *Debs* case we will argue fully the question which is raised under this heading, and respectfully refer to the brief in that case in support of our contention here, in order to save repetition and the time of this court.

Respectfully submitted,

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